TAN SOON GEOK

v.

PP & ANOR (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDULL HAMID EMBONG J
[CRIMINAL APPEAL NO: 42-48-2003]
18 AUGUST 2004

CRIMINAL PROCEDURE: *Prosecution - Documents referred to in charge - Discovery before commencement of trial - Whether discovery only limited to documents specified in and related to charge itself - Whether full disclosure of prosecution's case allowed by such discovery*

CRIMINAL PROCEDURE: *Discovery of documents - Discovery before trial - Whether limited only to documents specified in and related to charge itself*

CRIMINAL PROCEDURE: *Discovery of documents - Discovery during course of trial - Whether relevancy of documents the primary consideration - Discovery should not pre-empt evidence sought to be adduced by prosecution*

The appellant and the second respondent (R2) were charged in the Sessions Court with offences under s. 84(i) read together with s. 122C of the Securities Industry Act 1983. The appellant applied under s. 51 of the CPC for the supply of various documents seized by the public prosecutor (R1) from the appellant. The appellant contended that he was hampered in the preparation of his defence without access to those documents. The DPP however submitted that the application amounted to a pre-trial discovery and a fishing expedition by the appellant. The application was dismissed. The appellant appealed to the High Court.

Held (dismissing the appeal):

[1] The court was bound under the *stare decisis* principle to follow the Supreme Court decision of *PP v. Raymond Chia Kim Chwee & Anor*. There are two parts in the decision of *Raymond Chia*. The second part does not allow for a full disclosure of the prosecution case. The court cannot and should not anticipate how the prosecution will proceed with its case. It does not open the prosecution's door for a blanket discovery, but only in respect of discovery before the commencement of a case, those documents specified in and related to the charge itself. (p 672 a-g)

[2] The phrase 'justice of the case' is applicable to both sides. It will not be just to the prosecution for the court to order it to produce the documents forming part of its evidence as it will not be just to the appellant not to be informed specifically of the charge he has to answer. (p 673 a)

[3] The first part of *Raymond Chia* addresses the situation where the trial has already commenced. In this situation the primary consideration is the relevancy of the document sought. Here, the court should not pre-empt the evidence sought to be adduced by the prosecution. To allow so will result in a blanket discovery of the prosecution's case and constitute an improper exercise of the court's discretion. It will be more proper for the court to decide on the relevancy of a document when it has sight of and inspects it. The proper forum to do so is the court before which the trial is held. In the instant case, since the proceedings were already in progress, the production of the documents should be done as and when the need arose, and it was for the trial court to determine whether they were relevant to the case. (p 673 b-e)

Case(s) referred to:
Datuk Tiah Thee Kian v. PP & Another Appeal [2002] 2 CLJ 21 HC ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor v. Zainal Hj Ali [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 51
Securities Industry Act 1983, ss. 122C, 84(i)

For the appelant - Edmund Bon (Amir Hamzah Arshad); T/n Chooi & Co
For the 1st respondent - Abdul Karim Abdul Jalil, DPP
For the 2nd respondent - Ng Aik Guan; M/s Ng Aik Guan St Co

Reported by Andrew Christopher Simon

JUDGMENT

Abdull Hamid Embong J:
This is an appeal by the appellant against the decision of the Sessions Court dismissing his application for the supply by the first respondent (R1) of various documents seized by R1 from the appellant. The appellant and the second respondent (R2) are facing various charges, in the main relating to offences under s. 84(i) read together with s. 122C of the Securities Industry Act 1983 (the Act).

In the process of its investigation, the R1 through the office of the Securities Commission had exercised its powers under s. 134 of the Securities Commission Act 1993 to seize voluminous documents from the appellant. These are set out in detail in the search list.

The appellant contends that he is hampered in the preparation of his defence without now access to those documents. Learned counsel for the appellant, Encik Edmund Bon submitted that the charges are complicated and detailed in nature and that in the interest of the appellant, he needed to have sight of those documents in order that his client may give him proper instructions and that the defence may be amply prepared. Without those documents he is handicapped.

The various documents asked for by the appellant are as listed in the notis permohonan filed in the Sessions Court (see pp. 10-13) Record of Appeal and, Encik Edmund Bon, learned counsel for the appellant submitted that there were four categories of documents sought namely:

1. First information Report and Arrest Report (these have been supplied, and Item C in the list is no longer required).
2. Search and Seizure Lists (ie, items d and e in the List).
3. Seized documents (items f, g, I, j, k and I).
4. Charged related documents (items h, m, n, o, p, q, r, s and t).

Pre-trial discovery in a criminal case is unknown in Malaysia. Section 51 of the Criminal Procedure Code however empowers the court with a discretion to direct any person in possession of any property or document to produce the same before the court for the purposes of a trial. Section 51(1) CPC provides:

> Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this code or before such court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or poser such document or document is believed to be requiring him to attend and produce it at the time and place stated in the summons or order.

The appellant's application was made under this section. The learned Sessions Court Judge after considering submissions of both parties and the law had refused to allow this application. I am in agreement with the learned sessions judge and had decided that the exercise of his discretion should not be disturbed.

The learned deputy public prosecutor had submitted that this application amounted to a pre-trial discovery and a fishing expedition by the appellant. The categorization of the documents sought after by the appellant, learned

deputy said, was made to tailor this application to the High Court decision in *Datuk Tiah Thee Kian v. PP & Another Appeal* [2002] 2 CLJ 21 where the learned judge had allowed a similar application stating that the supply of the documents to the appellants there would not prejudice the prosecution. It was also held that not supplying those documents would delay the proceedings with applications for postponement by the defence in the course of the trial. It was further held that the application was for specified documents listed under five categories and cannot thus be said to be a general demand for which s. 51 CPC would have disallowed as was decided in an earlier case, *PP v. Raymond Chia Kim Chwee & Anor., v. Zainal Bin Hj Ali* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260. The learned sessions judge considered the principle stated by the Federal Court in *Raymond Chia* and disallowed this application citing the following paragraph from the decision of Hashim Yeop Sani SCJ:

> When the court is asked to exercise its discretion under section 51 of the CPC before the commencement of trial the Court must have regard to the provision of sections 152, 153 and 154 of the Criminal Procedure Code relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularize the charge sufficiently so as to give adequate notice to the accused person. The entitlement of the accused under section 51 of the CPC to any document or copy of documents or other material in the possession of the prosecution is entirely at the discretion of the court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as the requirement is satisfied the law is satisfied

The learned deputy in his submission further stated that the decision in *Datuk Tiah Thee Kian* is not in consonant with the rule that there could not be any pre-trial discovery in a criminal proceeding.

The appellant's counsel as well as Encik Ng Aik Guan, learned counsel for the second respondent, who supported this application, both took the stand that the court should look at the justice of the case and not ignore fairness or the principles of natural justice in considering whether or not to supply the documents asked for. Articles 5 and 8 of the Federal Constitution were cited. The said constitutional articles dealing with liberty of a person and equality before the law respectively cannot in form and spirit in my view be extended in its usage to apply to a situation as in this application. I am in agreement with the learned deputy that this court needs to look at the scope and purport of s. 51 CPC itself in coming with an answer on whether the discretion by the learned sessions judge was rightly exercised in the first instance.

In this respect I am bound by the *stare decisis* principle to follow the decision of the Supreme Court in *Raymond Chia*, and without going into the rhetorics of a debate on the principles of natural justice, would adhere to the ruling made in that case.

There are two parts in the decision in *Raymond Chia* which I have considered to be relevant to the determination of this appeal. They appear in the following paragraphs:

> Where the application under 51(i) of the Criminal Procedure Code is made in the course of the trial, the rule of relevancy must be strictly enforced. We feel that this is what Mallal's Criminal Procedure meant by saying that "anything which may reasonably be regarded as forming part of the evidence in the case may be, ordered to be produced and that is the primary object of these provisions.
>
> If the discretion is to be exercised before the commencement of trial the Court cannot anticipate how the prosecution will proceed. In other words the Court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under section 51 of the Criminal Procedure Code. In the first place the accused should know what documents had been taken from him and to say that unless such documents were delivered for his inspection he would not be able to adequately prepare his defence cannot be a true proposition. A general demand for unspecified documents should likewise, not be entertained. See *Anthony Gomez v. Ketua Polis Daerah, Kuantan* and *Khoo Siew Bee & Anor v Ketua Polis Kuala Lumpur* for another basis for the inspection and supply of the first information report and cautioned statement. Under section 51 of the Criminal Procedure Code the accused is most certainly entitled to have copies of documents which are specified in the charge. But the accused cannot be expected to be given access to all documents whatsoever taken by the police during investigation. In respect of application made in the course of the trial the materials or documents asked for must be relevant to the issues for adjudication.

My understanding of the latter paragraph is that it does not allow for a full disclosure of the prosecution case. The court cannot and should not anticipate how the prosecution will proceed with its case. It does not open the prosecution's door for a blanket discovery, but only in respect of discovery before the commencement of a case, those documents specified and related to the charge itself. The Supreme Court had stated:

> In exercising its discretion under s. 51(i) of the Criminal Procedure Code the Court has to consider the justice of the case and at what stage of the proceeding the application is made.

It must be remembered that the phrase "justice of the case" is applicable to both sides and it would not be just to the prosecution for the court to order it to produce the documents forming part of its evidence as it would not be just to the appellant not to be informed specifically the charge he "has to answer.

The first paragraph cited from the Supreme Court's judgment above addresses a situation, similar to the one in this case, where the trial has already commenced. Here, the primary consideration is the relevancy of the document sought for. In my view, the court should also not pre-empt the evidence sought to be adduced by the prosecution. To allow so, would also result in a blanket discovery of its case and this, in my view, would be an improper exercise of the court's discretion. It would be more proper for the court to decide on the relevancy of a document when it had sight of and inspected it. And the proper forum to do so is the court before which the trial is held. As was tersely expressed by the Supreme Court in *Raymond Chia*:

> The first thing to note is that the problem posed before this Court arose out of a criminal proceeding for an offence of forgery under sections 467 and 471 of the Penal Code and thereafter the Court which must consider whether the production of the material or document asked for is necessary or desirable is the Court before which the trial was pending or in which the trial was proceeding.

Thus, in my view, since this case is already in progress, the production of those documents should be done as and when the need arises, and be left to the trial court to determine whether they are relevant to the case.

For these reasons, this appeal was dismissed.